THE COLORADO WATER RIGHT.*

The formal judicial and legislative abrogation of the common-law riparian right, and the concurrent adoption of a doctrine of property in inland streams under the sanction of the appropriation of their waters to beneficial use, first occurred in Colorado. The usages growing out of the early judicial opinion in that state, as developed by an unbroken line of supporting decisions, constitute what is known as the *Colorado system* of irrigation law.

The legal inception of the Colorado system resides in the decision of the territorial supreme court in *Yunker* v. *Nichols* in 1872.[1] Yunker brought an action of trespass on the case against Nichols for diverting all the water from a jointly constructed irrigation canal passing from Bear Creek through the defendant's farm to that of the plaintiff.[2] The trial court held with the common law—that the right to have water flow over the land of another is an interest in the land and that a contract for such right-of-way lies under the Statute of Frauds—and found for the defendant, the agreement not having been reduced to writing. Upon appeal, however, the three justices of the appellate court were unanimous in the opinion that the lower court should be reversed, but each judge based his opinion upon a different cause.

Chief Justice Hallett believed that the territorial statute of 1861 conferred upon persons owning land "on the bank, margin, or *neighborhood* of any stream of water" a right-of-way over adjacent lands for purposes of irrigation.[3] He asserted that this statutory right withheld from a land owner that absolute dominion over his estate which could deny others permission to enter upon it for the purpose of conveying water to be used in irrigation. *The statute, argued Justice Hallett, was justified on the ground of climatic conditions and resulting economic necessities, and a grant of right emerged from the statute.*[4]

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*To be published in the forthcoming book of the author, "Irrigation Water Rights".

[1](1872) 1 Colo. 551.

[2]The canal had been constructed in 1871 by Yunker, Nichols, and John Bell, under a verbal agreement to share equally in the water conveyed thereby. Subsequently, Nichols, having a riparian estate, consumed all the water so that none passed down to Yunker whose lands were below.

[3]Colo. Rev. Stat. 363. "An Act to protect and regulate the irrigation of lands."

[4]Chief Justice Hallett's opinion was, in part, as follows:

"In England, and in this country, it is considered that the right of one person to conduct water over the land of another is an interest in real

Justice Belford found even broader grounds upon which to reverse the lower court. In his opinion, the verbal contract between Yunker and Nichols was construed to be a parol license amounting to an easement in favor of Yunker upon the estate of Nichols. He held the privilege to be revocable, as to future enjoyment, but that, having been granted upon consideration of money and labor expended, and being partly executed, it should be enforced when adequate compensation in damages could not be obtained.[5] Furthermore, Justice Belford found authority in the act of 1861 for supporting the opinion of his colleague, Chief Justice Hallett. But the constitutionality of that act being questioned at the time, *his opinion dwelt at length upon the economic necessities of the country which brought about its enactment and justified its validity.*[6]

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estate, which must be conveyed by deed in compliance with the terms of the statute of frauds. * * *

"The principles of the law are undoubtedly of universal application, but some latitude of construction must be allowed to meet the various conditions of life in different countries. * * * The principles of the decalogue may be applied to the conduct of men in every country and clime, but rules respecting the tenure of property must yield to the physical laws of nature, whenever such laws exert a controlling influence.

"In a dry and thirsty land it is necessary to divert the waters of streams from their natural channels, in order to obtain the fruits of the soil, and this necessity is so universal and imperious that it claims recognition of the law. The value and usefulness of agricultural lands, in this territory, depend upon the supply of water for irrigation, and this can only be obtained by constructing artificial channels through which it may flow over adjacent lands. These artificial channels are often of great length, and rarely within the lands of a single proprietor. * * * Of course, lands situated at a distance from a stream cannot be irrigated without passing over intermediate lands, and thus all tilled lands, wherever situated, are subject to the same necessity. In other lands, where the rain falls upon the just and the unjust, this necessity is unknown, and is not recognized by the law. But here the law has made provision for this necessity, by withholding from the land owner the absolute dominion of his estate, which would enable him to deny the right of others to enter upon it for the purpose of obtaining needed supplies of water. * * *

"Where the lands of this territory were derived from the general government, they were subject to the law of nature, which holds them barren until awakened to fertility by nourishing streams of water, and the purchasers could have no benefit from the grant without the right to irrigate them. It may be said that all lands are held in subordination to the dominant right of others, who must necessarily pass over them to obtain a supply of water to irrigate their own lands, and this servitude arises, not by grant, but by operation of law * * *." 1 Colo. 552-555.

[5] *Ibid,* 564.

[6] In concluding his opinion, Justice Belford said: "I am fully aware that courts should be slow to justify their decisions on the ground of necessity; but I am equally conscious of the fact that they will betray their trust if, in the administration of law or in the expounding of constitutional principles, they shut their eyes and refuse to recognize those conditions of society which call into force and operation principles whose existence and recognition cannot be disregarded without bringing ruin on

Justice Wells reversed his own opinion, previously rendered in the circuit court, but also dissented, in part, from the opinion of each of his associates. He refused to hold with Justice Belford on grounds of estoppel and performance of a partially executed contract. In so far as it was sought to rest the case upon the Statute of 1861, he disagreed with both Justice Hallett and Justice Belford, and maintained that the *rights of appropriation and way over the lands of another for purposes of irrigation arose out of the necessities of climate and soil and were independent of legislative action.* In concluding his opinion he said: *"It seems to me, therefore, that the right springs out of the necessity, and existed before the statute was enacted, and would still survive although the statute were repealed. If we say that the statute confers the right, then the statute may take it away, which cannot be admitted."*[7]

The case of *Yunker* v. *Nichols* is noteworthy as the legal foundation of the Colorado system. However, it failed to give the property right which it recognized and sought to establish that degree of security which would have resulted had the members of the court concurred in a single opinion. *The unanimity of the court in the conclusion that the arid soil and climate of necessity established the right of a non-riparian proprietor to take and convey water from a stream across the estate of another for purposes of irrigation is however fundamentally significant. From this rule of reason, so strongly defended by the entire court was developed the subsequent justification of the abrogation of the*

all. As has been well said by another, the law is not a system marked by folly, based on bald sentences without reason; it is a grand code, founded on the necessities of men, erected by mature judgment, gradually expanding in beneficence and wisdom as time progresses, and regulating with care the interest of society and civilization." *Ibid,* 569.

[7] *Ibid,* 570. Italics are the writer's.

The following extract is significant of the attitude of Justice Wells: "I conceive that, with us, the right of every proprietor to have a way over the lands intervening between his possession and the neighboring stream for the passage of water for the irrigation of so much of his land as may be actually cultivated is well sustained by force of the necessity arising from local peculiarities of climate; as in other countries, out of a like necessity, every proprietor has a way of right to his own close over the premises which shut it from the highway. But it appears to me that this right must rest altogether upon the necessity rather than upon the grant which the statute assumes to make. For in other countries, where the necessity does not exist, the right has not been recognized in the courts nor attempted to be confirmed by statute, and, where similar legislation has been attempted, in the instance of private ways, by statute, it has been held to be either void as an appropriation of private property to individual uses, * * * or else has been sustained as the regulation of an existing right, and not as conferring one." *Ibid,* 570.

common-law doctrine of riparian rights, and the substitution therefor of an institution of property in the use of water grounded upon economic necessity. It is also noteworthy that a rationalistic justification of an invasion of that absolute right in private property which denies expeditious utilization of natural resources is consequent to the decision of the court.

The question of the relativity of the respective rights of riparian and non-riparian proprietors did not appear in *Yunker* v. *Nichols,* and, in this respect, the rule there established was incomplete. Ten years passed before a case directly involving such interests brought the issue between riparian and non-riparian claimants before the state supreme court.

The Constitution of Colorado formally abrogated the common-law water right in that state in 1876. Both before and after the adoption of the constitution, considerable irrigation law was enacted in sole recognition of the doctrine of appropriation. For several years, such legislation was not subjected to judicial review, and the rights of both riparian and non-riparian claimants whose diversions for irrigation and mining antedated both the statutes and the constitution remained unadjudicated.

The issue was brought before the supreme court of the state in 1882, and it was clearly affirmed that property in the use of the natural waters of the state should rest upon the fact of their appropriation to a beneficial use, and that the rule of the common law should be of no effect.[8] The case arose from the interference, by riparian proprietors upon St. Vrain Creek, with the diversion of the waters of the stream by the Left Hand Ditch Company. Both parties claimed the water for irrigation. The defendants based their claim upon the proprietorship of riparian lands, and the ditch company asserted ownership by virtue of lawful diversion and prior appropriation for beneficial use.[9] The riparian proprietors claimed that the common law prevailed in Colorado before the adoption of the constitution in 1876, that the doctrine of appropriation was nowhere recognized until the federal act of 1866 so stipulated, and that they had established a riparian right to irrigate

[8]Coffin *v.* Left Hand Ditch Co. (1882) 6 Colo. 443.

[9]The contrast in the grounds for the alleged rights is especially clear in this case because of the fact that, in their appropriation of the stream, the company conveyed the water from the valley of the St. Vrain and across a divide into the bed of James Creek, thence into Left Hand Creek, and therefrom by ditches to tributary lands. This situation precluded the possibility of redefining or interpolating in an attempt to bring the diversion under the common law.

their lands adjacent to the St. Vrain by settlement thereon at a time which antedated both of these enactments. They asserted absolute title, in fee simple, ("than which, none other was known to the law under which their patents were confirmed") together with all easements and appurtenances, and without reservation or exception of any ditches or water rights. In reaching its conclusions, the court made no reference to the precedent established ten years before in *Yunker* v. *Nichols,* but based its decision upon the facts of climatic conditions and the rule of economic expedience, as acknowledged by Congress in 1866 and supported by the United States Supreme Court in 1879.[10]

The following excerpts from the opinion of the Supreme Court of Colorado, in *Coffin* v. *Left Hand Ditch Company*[11] will serve to reveal the reasoning upon which the common-law doctrine of water rights was abrogated in Colorado.

"But two important questions upon the subject of water rights are fairly presented by the record, and we cannot well avoid resting our discussion upon them.

"It is contended by counsel for the appellants that the common-law principles of riparian proprietorship prevailed in Colorado until 1876, and that the doctrine of priority of right to water by priority of appropriation thereof was first recognized and adopted in the constitution. But we think the latter doctrine has existed from the date of the earliest appropriations of water within the boundaries of the state. The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive; except in a few favored sections, artificial irrigation for agriculture is an absolute necessity. Water in the various streams thus acquires a value unknown in moister climates. Instead of being a mere incident to the soil, it rises, when appropriated, to the dignity of a distinct usufructuary estate, or right of property. It has been the policy of the national, as well as the territorial and state governments, to encourage the diversion and use of water in this country for agriculture; and vast expenditures of time and money have been made in reclaiming and fertilizing by irrigation portions of our unproductive territory. Houses have been built and permanent improvements made; the soil has been cultivated and thousands of acres have been rendered immensely valuable, with the understanding that appropriations of water would be protected. Deny the doctrine of priority or superiority of right by priority of appropriation, and a great part of the value of this property is at once destroyed.

[10]Justice Miller in Broder *v.* Natoma Water & Mining Co. (1879) 101 U. S. 274.

[11](1882) 6 Colo. 443, at 446, 447.

"The right to water in this country, by priority of appropriation thereof, we think it is, and has always been, the duty of the national and state governments to protect. The right itself, and the obligation to protect it, existed prior to legislation on the subject of irrigation. It is entitled to protection as well after patent to a third party of the land over which the natural stream flows, as when such land is a part of the public domain; and it is immaterial whether or not it is mentioned in the patent and expressly excluded from the grant.

"The act of Congress protecting in patents such right in water appropriated, when recognized by local customs and laws, 'was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one' (*Broder* v. *Natoma W. & M. Co.*, 11 Otto (101 U. S.) 274.)

"We conclude then, that the common-law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith. And we hold that, in the absence of express statutes to the contrary, the first proprietor of water from a natural stream for a beneficial purpose has, with the qualifications contained in the constitution, a prior right thereto, to the extent of such appropriation."

The two unanimous initial opinions of the Colorado court state very clearly the fundamental principles of the *Colorado water right,* namely, (1) *a usufructuary property right in natural waters sanctioned solely by prior appropriation to beneficial and necessary use,* and (2) *the absolute abrogation of riparian proprietorship, as such, in the use of non-navigable streams.* These cases have been followed and supported in Colorado until their principles are no longer disputed.[12]

In 1909, the Colorado Supreme Court finally characterized the origin and nature of the Colorado water right and, at the same time, marked the contrast between the Colorado and the California systems of irrigation law. A stubborn riparian claimant, having carried an appeal to the supreme court, provoked an unanimously adverse judgment expressed, in part, as follows:

"We are entirely satisfied that the sole question argued and submitted to the trial court by counsel on both sides, was whether

[12]Golden Land Co. *v.* Bright (1884) 8 Colo. 144, 6 Pac. 142; Hammond *v.* Rose (1888) 11 Colo. 524, 19 Pac. 466; Oppenlander *v.* L. H. Ditch Co. (1892) 18 Colo. 142, 31 Pac. 854; Kansas *v.* Colorado (1907) 206 U. S. 46, 27 Sup. Ct. 655; Sternberger *v.* Seaton Mining Co. (1909) 45 Colo. 401, 102 Pac. 168.

the common-law doctrine of continuous flow, under the facts disclosed by this record, exists in Colorado. At this late date it would seem to us, as it evidently did to the trial court, idle to make such contention in this state. The matter has long ago been set at rest. The authorities relied upon by the plaintiffs are those which sustain the so-called California doctrine, * * * in which, (*inter alia*) it was held that the common law, as to riparian ownership, was not abolished by any law of that state, but still existed there, side by side with the doctrine of appropriation. * * *

"This judgment (of the Colorado trial court), being in effect that the common-law doctrine of continuous flow of a natural stream is inapplicable to conditions in this state, and that, by necessary construction of our local customs, statutes and constitution, it is abolished, is affirmed."[13]

THE COLORADO DOCTRINE IN OTHER STATES.

That part of the Colorado system established in 1872 by the unanimous opinion of the Supreme Court in *Yunker* v. *Nichols,* and unanimously reiterated ten years later, and again finally in 1909, by the same court, has been virtually adopted by *all irrigation states and territories* of the United States.[14] It is true that judicial decisions in California and Montana appear to deny this assertion, but there is reason to believe that prevailing practice disregards much that may be read in these decisions.[15]

[13]Sternberger *v.* Seaton Mining Co. (1909) 45 Colo. 401, 403, 408, 102 Pac. 168.

[14]In Yunker *v.* Nichols, it is to be noted that the opinion of Chief Justice Hallett was concurred in by his associates, and that opinion was alone sufficient to determine the cause in question. The additional grounds advanced by Associate Justices Belford and Wells were, in a sense, superfluous in that case; but they were contributory to the principles established in the later case, Coffin *v.* Left Hand Ditch Co., *supra,* and it is strange that they were not there cited.

[15]Congressman Needham, of California, testifying before the United States Supreme Court Commissioner, in Kansas *v.* Colorado (1907) 206 U. S. 46, 27 Sup. Ct. 655, said, in substance, that the doctrine of riparian rights had been departed from in California, since, under that doctrine, industrial development is difficult; that there had been a departure from the principles laid down in Lux *v.* Haggin because, at that time, the value of water was not realized, and that that decision has been practically reversed on subsequent occasions; and that "the doctrine of prior appropriation and the application of water to a beneficial use is, in effect, in force now in that state" (Transcript of Record, Vol. II, p. 285).

Elwood Mead, Chief of the Division of Irrigation and Drainage Investigations, U. S. Dept. of Agriculture, testified in the same suit as follows:

"While the courts have sustained the doctrine of riparian rights, and made it general in application in the state, as a matter of fact the streams in the western part of Nebraska are being used and diverted in accordance with the law that provides for their diversion under the doctrine of appropriation. No attention is paid to that decision (Supreme Court of Kansas upholding riparian rights in Clark *v.* Allaman (1905) 71 Kans. 706, 80 Pac. 571) in practice. Now you might take every state where the two

With the two exceptions of California and Montana, the *arid* states and territories have endorsed the principles of the Colorado system *in toto*, and not only have established a right to appropriate water, but have denied any riparian prerogative in the appropriation or use of streams.

Nevada confirmed the California system in 1872;[16] but after thirteen years' trial the common-law principle was abandoned and the supreme court declared the earlier precedent, in so far as it conflicted with the doctrine of appropriation, to be overruled.[17] Idaho embraced the doctrine of appropriation in 1890,[18] New Mexico and Utah in 1891,[19] Arizona in 1895,[20] and Wyoming in 1896.[21] Oregon, not strictly an arid state, seems reasonably to have longer retained the common-law water right and followed the general practice of California. But, by a thorough revision of water laws in 1909 and 1911, Oregon virtually abandoned the common-law doctrine for that of priority of appropriation and

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doctrines exist, and there is just the same explanation." Transcript of Record, Vol. II, p. 1422.

See also *infra*, note 17.

In Montana, it is held that the right to the use of running waters follows the ownership of riparian soil; but it is also said that the state has, of necessity, assumed the ownership, *sub modo*, of the streams of the state and "expressly granted the right to appropriate the waters of such streams, which right, if properly exercised in compliance with the requirements of the statutes, vests in the appropriator full legal title to the use of such waters by virtue of the grant made by the state as owner of the water." Smith *v.* Denniff (1900) 24 Mont. 20, 22, 60 Pac. 398.

The legislature of California, in 1911, became fearful of the possible diversion in Arizona of the waters of Lake Tahoe which lies partially within each state, and paradoxically declared that "All the water or the use of water within the state of California is the property of the people of the State of California." Amendment to Civil Code Sec. 1410 (April 8, 1911), Stat. of 1911, p. 821.

[16]Vansickle *v.* Haines (1872) 7 Nev. 249.

[17]Jones *v.* Adams (1885) 19 Nev. 78, 6 Pac. 442; Walsh *v.* Wallace (1902) 26 Nev. 299, 67 Pac. 914; Twaddle *v.* Winters (1906) 29 Nev. 88, 85 Pac. 280.

In the latter case the court denounced the dual system of California in the following terms: "The California decisions cited for appellants may no longer be considered good law even in the state in which they were rendered." At p. 106.

[18]Drake *v.* Earhart (1890) 2 Idaho 750, 23 Pac. 541; Krall *v.* United States (1897) 79 Fed. 241.

[19]Trambley *v.* Lutherman (1891) 6 N. Mex. 15, 27 Pac. 312; Stowell *v.* Johnson (1891) 7 Utah 215, 26 Pac. 290.

[20]Chandler *v.* Austin (1895) 4 Ariz. 346, 42 Pac. 483.

[21]Moyer *v.* Preston (1896) 6 Wyo. 308, 44 Pac. 845; Willey *v.* Decker (1903) 11 Wyo. 496, 73 Pac. 270.

beneficial use.[22] In all of these judicial opinions and statutes the policy was based upon the grounds of economic necessity, as reflected in early customs in mining and irrigation, as recognized by Congress in the acts of 1866 and 1870,[23] and as approved by the Supreme Court of the United States.[24] Moreover, the courts universally recognized the Colorado cases, including *Coffin* v. *Left Hand Ditch Company*,[25] as having established and defined the priority right.[26]

THEORY OF THE COLORADO WATER RIGHT.

In Colorado, Nevada, and Utah, the natural waters within the state are declared to be the *property of the public*,[27] and in Wyoming, Idaho and Oregon,[28] to be the *property of the state*. Furthermore, *judicial law* in these states in the beginning, authorized grants of usufructuary rights in streams by the state to private persons, such grants being conditioned only upon priority of appropriation and a beneficial use, and the word of the courts has been in each state subsequently enacted into statutory or constitutional law. Just what construction the enacting legislatures and conventions of these states would have put upon the term *property*

[22]Amendment to Civil Code; laws of Oregon 1909, Ch. 216; Irrigation Dist. Law 1911, Ch. 223.

"Starting in with the adoption of the strict rule or the common-law theory of riparian rights, even as to undiminished flow of the water in the natural streams, the statutes enacted at various times as the needs and necessities of the state became more and more apparent, have gradually invaded that rule until, as to the use of the waters for all beneficial purposes, there is very little left of that ancient exposition of the law of waters in the State." Kinney on Irrigation (2d ed.) 3508.

The opinion of the Supreme Court of Oregon in Hough *v.* Porter, 51 Oregon 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728, in January, 1909, clearly defined and established the non-riparian principles which were enacted into statute a few weeks later.

[23]Rev. Stat. §§ 2339 & 2340.

[24]Broder *v.* Natoma Water & Mining Co. (1879) 101 U. S. 274; Kansas *v.* Colorado (1907) 206 U. S. 46, 27 Sup. Ct. 655.

[25]*Supra*, note 8.

[26]"In all the arid states following the 'Colorado System' and sustaining the doctrine of appropriation as against the common-law doctrine of riparian rights, the law has become well settled and litigants are not inclined to raise nor the courts to listen to any other contention. Its beneficient results have now been demonstrated by more than thirty years of continuous practice, and the property interests that have developed under it now amount in value to hundreds of millions of dollars." Mills, Irrigation Manual, 43.

[27]Constitution of Colorado, Art. 14, § 5; Statutes of Nev., 1903, p. 24; Statutes of Utah, 1905, Ch. 108.

[28]Constitution of Wyo., Art. 8, § 1; Idaho Civil Code of 1901, § 2625; Amendment to Civil Code of Oregon, § 10, 1911.

of the public (*or state*) is uncertain; but if they had any one purpose clearly in mind it was the recognition of the existence of an actual or potential *property-object* (*Eigenthumsobjeckt*)[29] in the streams within their boundaries, which was previously unknown to the national statutes or the common law, and which was unused and unappropriated, and, in fact, unclaimed and unrecognized, by the United States as the original land-owner under our government. In order to endow the irrigation right with the complete attributes of property, it was necessary not only that streams should have value and that they should be appropriable to beneficial use, but that they should be *legally acknowledged as objects of property.* The value of the streams resulted spontaneously from the conditions of utility and scarcity of flowing waters in an arid country, but their property qualification could only be made complete by legislative enactment or judicial recognition. This, the Colorado law attempts properly to do.[30] The theory of the law is that such property attributes as emerged from appropriability, high utility, and comparative scarcity of streams of water in an arid climate lacked the complementary property attribute of *legal acknowledgment,* and, in the absence of such acknowledgment, were unowned and, indeed, unclaimed by proprietors of the land over which the streams passed. Whatever the wording of the law, it may rightly be regarded (1) *as a recognition of an appropriable use in the streams of the state,* (2) *as a provision for the granting of that use as a public trust to private persons, and* (3) *as authority for the administration of that trust by public agents operative within the locus of its existence.*

In the arid regions, water is not an incident to and inseparable from the soil, but by nature is segregated from the land, and acquires an individuality among the cooperating forces of industry almost as distinct as is that of labor or capital. In theory, therefore, property in water is the right to appropriate the actual resources of the streams to reasonably useful purposes, and the

[29]Property objects have been well defined as material things having value, which are capable of appropriation, which have separate existence, and which are recognized by the law as objects of property:

"Eigenthumsobjeckte sind alle sächlichen Gegenstande, welche aneignungsfähig sind, eine abgesonderte Existenz haben, irgend welchen Werth haben (Sachguter sind) und von der Rechtsordnung als Eigenthumsobjeckte anerkannt sind." Samter, Das Eigenthum, S. 4.

[30]It has elsewhere been observed by the author that both the Constitution and Civil Code of California weakly acknowledged property qualifications of the waters of the state beyond the knowledge of the common law; but the supreme court of the state has in each instance invalidated the enactment. 5 California Law Rev. No. 2.

object of its administration is a thrifty and harmonious socio-economic development.[31]

The theory underlying the Colorado system refuses to recognize preexisting law as the sole legitimate source of property rights; but asserts that property finds its origin in relations between men and things, or society and the resources of its environment as affected by its wants, or more especially its necessities.

As to the common-law riparian right, the Colorado law denies the possibility of its existence under an irrigation economy, and, indeed, denies its ever having existed on the non-navigable streams of arid America. The last assertion seems to be doubly supported. A riparian right, as contemplated by the common law, would be without utility and, consequently, unappropriable in an arid land. Even if such were not true, the broader and superior utilities realizable and recognized under the priority and beneficial-use principle preclude the co-existence of the riparian principle—the first, by its nature, excludes the second. Furthermore, the theory asserts that the common-law right never did prevail nor command recognition upon the lands in question, and that the United States, as grantee from Mexico and France, was not vested with riparian rights and cannot confer such rights upon subsequent grantees. It is not contended that the common law, as a whole, should be abrogated. But it is held that a part of the legal fabric which grew out of the social and economic relations of a humid environment is unsuited to a more complex economy and an arid habitat; and that necessity and economy demand the abandonment of the riparian doctrine and the erection of a property right in the use of natural waters which shall be compatible with the material welfare and progress of society.

Justice Helm, answering the contention of the prevalence of the riparian right prior to 1876, in an opinion for the supreme court of Colorado, set forth the peculiar climatic and economic conditions and the consequent unfitness of the common law of

[31] "The right to the enjoyment of water for a beneficial use is not confined to the particular land where the water is first applied; it may be alienated, independently of the land, and changed from place to place, with the single limitation that the change shall not injuriously affect the vested rights of others." Ironstone Co. *v.* Ashenfelter (1914) 57 Colo. 31, 140 Pac. 177.

"The right to the use of water depends upon the needs of the appropriator. In this respect the law makes no distinction between appropriators for irrigation, for domestic use, or for power. As to all these purposes where a valid appropriation is made the right (to appropriate) is limited only by the law of necessity." Comstock *v.* Larimer & Weld Co. (1914) 58 Colo. 186, 145 Pac. 700.

waters to prevail in that state. The substance of his argument supports the recognition of a doctrine in conflict with the common law because of "imperative necessity", it seeks to establish the fact of property in streams through recognition of their appropriability to beneficial use, and asserts that such use and doctrine have existed and have been recognized since the first appropriation of water within the state.[32] The same theory prevails in the judicial decisions and statutes of Wyoming. A leading opinion of the supreme court of that state contains the following—

"In this state on the other hand the common-law doctrine concerning the rights of a riparian owner in the water of a natural stream has been held to be unsuited to our conditions, and this court has declared that the rule never obtained in this jurisdiction (*Moyer* v. *Preston,* 6 Wyo. 308). It was said in the opinion in that case that 'a different principle better adapted to the material conditions of this region has been recognized. That principle, briefly stated, is that the right to the use of water for beneficial purposes depends upon a prior appropriation'. And, further, in explanation of the reasons for the existence of the new doctrine, it is said: 'It is the natural outgrowth of the conditions existing in this region of the country. The climate is dry, the soil is arid and largely unproductive in the absence of irrigation, but when water is applied by that means it becomes capable of successful cultivation. The benefits accruing to land upon the banks of a stream without any physical application of the water are few; and while the land contiguous to water, and so favorably located as naturally to derive any advantage therefrom, is comparatively small in area, the remainder, which comprise by far the greater proportion of our lands otherwise susceptible to cultivation, must forever remain in their wild and unproductive condition unless they are reclaimed by irrigation. Irrigation and such reclamation cannot be accomplished with any degree of success or permanency without the right to divert and appropriate water of natural streams for that purpose and a security accorded to that right. Thus, the imperative and growing necessity of our conditions in this respect alone, to say nothing of other beneficial uses, also important, has compelled the recognition rather than the adoption of the law of prior appropriation.' "[33]

The earlier decisions in Nevada followed the theory of the California precedents, namely, that the patentee of the government was vested with the riparian right of the common law in all streams and that subsequent proprietors succeed to that property.[34]

[32]Coffin *v.* Left Hand Ditch Co. (1882) 6 Colo. 443.

[33]Willey *v.* Decker (1903) 11 Wyo. 496, 515, 516, 73 Pac. 210.

[34]Vansickle *v.* Haines (1872) 7 Nev. 249, and cases there cited.

These decisions were overruled in 1885 upon the theory that the common-law doctrine of water rights was of no force because unsuited to natural conditions in that state.[35] The language of the Nevada court is, in part, as follows:

"Here the soil is arid and unfit for cultivation unless irrigated by the waters of running streams. The general surface of the state is table-land, traversed by parallel mountain ranges. The great plains of the state afford natural advantages for conducting water, and lands otherwise waste and valueless become productive by artificial irrigation. The conditions of the country and the necessities of the situation impelled settlers upon the public lands to resort to the diversion and use of waters. This fact of itself is a striking illustration and conclusive evidence of the inapplicability of the common-law rule."[36]

The supreme court of Arizona, in rendering its leading decision upon the nature of water rights, reviewed the antiquity of the practice of appropriation of water for use in irrigation, resulting from climatic necessity in that country, and continued in the following terms:

"Thus we see that this is the oldest method of skilled husbandry, and probably a large number of the human race have ever depended upon artificial irrigation for their food products. The riparian rights of the common law could not exist under such systems; and a higher antiquity, a better reason, and more beneficent results have flowed from the doctrine that all right in water in non-navigable streams must be subservient to its use in tilling the soil."

The opinion further asserts that the common law, in so far as it relates to the use of water, "has never been and is not now suited to conditions that exist here."[37]

The theory of the leading Utah decisions is apparent in the following quotation from a characteristic opinion of the supreme court of that state:

"Riparian rights have never been recognized in this territory, or in any state or territory where irrigation is necessary; for the appropriation of water for the purpose of irrigation is entirely and unavoidably in conflict with the common-law doc-

[35]Jones *v.* Adams (1885) 19 Nev. 78, 6 Pac. 442; Reno Smelting M. & R. Works *v.* Stephenson (1889) 20 Nev. 269, 21 Pac. 317; Twaddle *v.* Winters (1906) 29 Nev. 88, 85 Pac. 280.

[36]Reno Smelting M. & R. Works *v.* Stephenson (1889) 20 Nev. 269, 280, 21 Pac. 317.

[37]Clough *v.* Wing (1888) 2 Ariz. 371, 381, 17 Pac. 453.

trine of riparian proprietorship. * * * The legislature of this territory has always ignored this claim of riparian proprietors, and the practice and usages of the inhabitants have never considered it applicable and have never regarded it."[38]

The supreme court of Idaho refers to the common-law doctrine as the "phantom of riparian rights," and its theory of the priority property right is expressed in the following opinion:

"Whether or not it (the doctrine of appropriation) is a beneficent rule, it is the lineal descendant of the law of necessity. When, from the most energetic and enterprising classes of the east, that enormous tide of emigration poured into the west, this was found an arid land, which could be utilized as an agricultural country, or made valuable for its gold, only by the use of its streams of water. The new inhabitants were without law, but they quickly recognized that each man should not be a law unto himself. Accustomed, as they had been, to obedience to the laws they had helped to make, as the settlements increased to such numbers as justified organization they established their local customs and rules for their government in the use of water and land. They found a new condition of things. The use of water to which they had been accustomed, and the laws concerning it had no application here. The demand for water they found greater than the supply, as is the unfortunate fact still all over this arid region. Instead of attempting to divide it among all, thus making it unprofitable to any, or instead of applying the common-law riparian doctrine to which they had been accustomed, they disregarded the traditions of the past, and established as the only rule suitable to their situation that of prior appropriation. This did not mean that the first appropriator could take what he pleased, but what he actually needed, and could properly use without waste. Thus was established the local custom which pervaded the entire West and became the basis of the laws we have to-day upon that subject."[39]

The Idaho court has more recently emphasized its theory of property in water and the basis of appropriation in that state in the following terms: "Appropriators and users of water within this State will be required and commanded to so divert, use and apply the waters as to secure the *largest duty and greatest service* therefrom."[40]

Justice Elliott, of the Colorado Supreme Court, has admirably contrasted the riparian right of the common law with the priority water right under the Colorado system.

[38]Stowell *v.* Johnson (1891) 7 Utah 215, 225-6, 26 Pac. 290.

[39]Drake *v.* Earhart (1890) 2 Idaho 750, 754-5, 23 Pac. 541.

[40]Van Camp *v.* Emery (1907) 13 Idaho 202, 89 Pac. 752. Italics are the writer's.

"At common law the water of a natural stream is an incident of the soil through which it flows; *under the Constitution (referring to the Colorado constitution), the unappropriated water of every natural stream is the property of the public.* Under the common law the riparian owner is, for certain purposes, entitled to the exclusive use of the water as it flows through his land; *under the constitution the use of the water is dedicated to the people of the state subject to appropriation.* The riparian owner's right to the use of water does not depend upon user and is not forfeited by non-user; *the appropriator has no superior right or privilege with respect to the use of water on the ground that he is a riparian owner; his right of use depends solely upon appropriation and user; and he may forfeit such right by abandonment or non-user for such length of time as that abandonment may be implied.* A riparian proprietor owning both sides of a running stream may divert the waters therefrom, provided he returns the same to the natural stream before it leaves his own land so that it may reach the riparian proprietor below without material diminution in quantity, quality, or force; *the appropriator, though he may not own the land on either bank of a running stream, may divert the water therefrom and carry the same withersoever necessity may require for beneficial use, without returning it or any part of it to the natural stream in any manner. The appropriator may, under certain circumstances change the point of diversion as well as the place of application of the water; he has a property right in the water lawfully diverted to beneficial use and may dispose of the same separate and apart from the land in connection with which the right ripened to any one who will continue such use without injury to the rights of others."*[41]

In the light of judicial opinions in the arid states, it appears that the fundamental theory of existing law, in so far as the doctrine of appropriation is acknowledged, *recognizes an object of property in the use of natural waters peculiar to an arid environment,* and that an equitable and economic distribution of this use justifies a separate property right therein. It further appears that *such property is rightly considered to be of a dual nature; that is to say, it is a subject of both social and personal, or public and private, attributes.*

Property in streams for irrigation and mining purposes is deemed to be of a social nature in so far as public control is essential in facilitating the economical administration of natural resources and in realizing their proper social efficiency. It is considered of a personal nature in so far as the appropriation

[41]Oppenlander *v.* Left Hand Ditch Co. (1892) 18 Colo. 142, 148-9, 31 Pac. 854. Italics are present author's.

of streams to private use may serve the tenets of the prevailing social system and may be made to render the acknowledged benefits of private property when considered over the entire field of its application. *Such a theory denies the rationale of the perpetuity of law merely because of its past prevalence or beneficence, and assumes the organic source of the law to lie in the existing socio-economic order imposed, primarily, by conditions over which society has no control and, secondarily, by the recognized philosophy of the present social system.* The leading judicial decisions supporting the Colorado system are unanimous upon the point that necessity is the rule of their action, and that the rule of necessity eliminates the possibility of perpetuating the property right in natural waters which is defined by English law and which prevails in humid America.

Proceeding upon the hypothesis that water rights find their natural origin in the scarcity, usefulness, and appropriability of the waters of flowing streams, and that equitable appropriation and economic use imply a supervisory authority, *the arid states have virtually recognized a divisible property in the streams within their borders, thereby assigning the right of possession (appropriation and use) to private proprietors and the right of title (control) to the state. In this separation, the streams have been declared to be property of the public, and the qualified use thereof is made subject to private grant, the reservation of authority on the part of the grantor being sufficient to exercise a rigorous control over the use in the hands of the grantee.*

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